No. 2475

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHOY GUM, sometimes referred to as Lo King,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Filed this.....day of June, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant herein most respectfully petitions this Honorable Court for a rehearing herein based upon a consideration of the fact that the hearing conducted by the Immigration Service was before an immigration inspector who acted in the joint capacity of informer, arresting officer, inquisitor

and judge. Viewing the fact that the matters contained in the four assignments of what the appellant contends was conduct vitally prejudicial to her interests, were not the actions of an impartial inspector with his mind free from bias and prejudice, but on the exact contrary, the appellant feels that the fact that the inspector was jointly informer, arresting officer, inquisitor and judge, has caused has actions in said hearing to be prejudicial to her to an extent beyond what would have been the case had the inspector's mind not been biased (perhaps unconsciously) by his former activities against her. In other words, is it not fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal, and is it not essential that the trial inspector be not disqualified by his formed activities in the case, and does not the law so contemplate, and for said reason, are not the proceedings herein illegal and void?

In the decision rendered in this matter the Court recites as follows:

> (5) "A copy of the proceedings before the immigration officers is appended to the petition, so that what was actually done is made to appear from the record."

It appears from page 15 of the transcript in the examination of Choy Gum by Immigrant Inspector F. H. Ainsworth that he was the *immigrant officer* with the *arresting* party. This is shown by referring to two separate questions which he framed in his examination of Choy Gum, transcript page 15, wherein he asks:

"Q. But that is the woman who keeps the house, the woman we saw there this morning?"

and in his examination of Tom Yook Lan, transcribed page 20, wherein he asks the following question:

"Q. Was that the lady we saw there this morning?"

It was at that time the custom of the local immigration service to have police officers detailed with them to assist in making the raids and arrests, they, the police officers, acting under the general direction of the immigration officers. The questions framed above by Immigrant Inspector-in-charge Ainsworth, shows that he was with the raiding party, and by his official rank, in charge thereof.

The fact that Immigrant Inspector F. H. Ainsworth was the *examining inspector* is shown in the transcript, page 13, in the examination of Choy Gum; transcript, page 16, in the examination of Leong Toe; transcript, page 18, examination of Ton Yook Lan, and transcript, page 22, the examination of Wong Go.

The further fact that Immigration Inspector F. H. Ainsworth was the *officer applying for the warrant of arrest* is shown by the transcript, page 32, where his initials appear to the application for the warrant of arrest which was presented by him for the signature of the Commissioner of Immigration. It also appears on pages 30 and 31 of the transcript and page 33 of the transcript that Inspector F. H. Ainsworth prepared respectively the first and

second telegraphic applications for a warrant of arrest, his initials appearing at the bottom of each telegram, indicating that he prepared the same, and caused it to be presented to the Commissioner of Immigration for his signature.

The further fact that Immigration Inspector Ainsworth was the *officer conducting the hearing* appears from the transcript, pages 35 and 39.

It appears from the above references to the record that Immigration Inspector F. H. Ainsworth was respectively the arresting immigration officer, the immigration officer conducting the preliminary examinations, the immigration officer preparing the application for the warrant of arrest, the immigration officer preparing the two telegraphic applications for the warrant of arrest, and the immigration officer conducting the hearing accorded upon the warrant of arrest.

The different specifications set forth the matters or doings of Immigration Inspector Ainsworth which the appellant contends vitally prejudiced her case and caused her deportation to be ordered. An impartial inspector with his mind free from those prior connections with the case which clouded and stifled the impartial judgment to which she was entitled and substituted in its place a prejudiced pre-judgment, would the appellant feels, have caused a very different presentation of her case to the Secretary of Commerce and Labor, and one that she feels would have resulted in the cancellation of the warrant of arrest.

In commenting upon this system of procedure, Judge Holt in the case of U. S. v. Williams, 185 Fed. 598, states:

> "The whole proceeding is usually substantially in the control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor and judge. The secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never sees or hears the person proceeded against or the witnesses."

It is true that the regulations provide that the Secretary of the Department shall be the officer who officially determines the case, and either directs the issuance of the warrant of deportation or the cancellation of the warrant of arrest, but the vital and imperative matter to the appellant is that she should have the benefit of having her case heard and recommendation made by an impartial immigration inspector, whose mind is free from bias against her. The great power of the examining inspector, and how he may unjustly wrong an alien in the exercise of the discretion committed to him, is apparent when we read the letter of the Commissioner General of Immigration, under date of March 23rd, 1911 (53244/1-A), promulgating an incorporation of this addition to the regulations of the department under which these hearings were held:

> "By direction of the assistant secretary, you are instructed to make arrangements whereby all records of hearings under departmental warrants of arrest will be concluded with a summary and definite recommendation from the examining officer, as to whether or not the

alien whose case is covered by such proceedings should not be deported.

The examining officer is in a particularly good position to make such a recommendation, as he has had an opportunity to observe the conduct of the witnesses under examination and to develop an opinion as to whether or not the testimony of any particular witness is entitled to greater or less weight."

These special directions of the Commissioner-General certainly disclose that whether we call the immigration inspectors conducting these hearings, judges, examining inspectors, or by whatever designation, and whether their final views of the case are called judgments, findings and decrees, reports, or recommendations, the substance is the same. The inspector exercises the functions of the trial judge, and from this vantage point it is most respectively submitted no partisan mind should be permitted to impede or misdirect the fair and impartial consideration of the evidence submitted and weigh its value. It is further felt that any other system would be un-American, unjust and unworthy of our system of government, whose cornerstones are justice, equality and fair dealing. The regulations promulgated by the department certainly do not authorize that such hearings should be conducted before an immigration inspector who has previously acted in the capacity of arresting officer, examining inspector, and officer applying for the warrant of arrest. It may likewise be said that the regulations do not expressly prohibit such a course of procedure, but it is respectfully sub-

mitted that in the actual administration of these laws, it would be proper to select an immigration inspector to conduct the hearing who has had no such prior connection with the case as would prejudice his mind to the point of stifling all fair and impartial consideration of the evidence submitted.

The difficulty of pointing out affirmatively and in a conclusive manner the extent to which the bias or former connection of the examining inspector with the case at issue, has clouded or misdirected his judgment is appreciated. It is quite improbable that one would be enabled to peer into the working of the mind of the examining inspector, and to be able to say positively wherein he had wronged or misjudged the case of an alien. It is the very existence of this difficulty which leads us to the conclusion that all such hearings which are conducted by an immigration inspector who has had these previous prejudicial connections with the case, are unfair, illegal and void. This Honorable Court in the case of White v. Gregory, 213 Fed. 768, held that

> "it (the Court) will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers."

It is true that the Supreme Court in the case of Low Wah Suey v. Backus, 225 U. S. 460, held that:

> "Considering the summary character of the hearing provided by statute and the rights given to counsel in the rules prescribed, we are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the

> alien of a fair, though summary, hearing as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute."

The tribunal was there considering the regulations in a general manner, and not in response to any specific allegation or circumstance. It is perfectly true that an immigration inspector who had no prior connection with the case of Choy Gum might have been detailed to conduct the hearing, and conducting it under the regulations his connection in the premises would have been upheld by the quotation from the case of Lau Wah Suey v. Backus, supra, but it is also respectfully contended that an immigration inspector who has previously acted in the capacity of an arresting officer and examining inspector, and in that capacity recommended the issuance of a warrant of arrest, made the application therefor, and then with his adverse opinions of the alien as evidenced by his affirmative actions, adverse conclusions and reports against her, is scarcely one whose mind is free from prejudice, and one who could impartially consider the case to be presented by the alien.

It is of course obvious that the preliminary actions of the Commissioner of Immigration and the Secretary of Commerce and Labor, are purely administrative. This does not apply to the immigration inspector whose activities for the time being controls or guides the actions of his superior officers.

An inspection of this record will show that it is entirely conceivable that an immigration inspector, unbiased by any prior connection with the case, might have conducted himself very differently in the proceedings had, and probably would have made a recommendation to the Department which would have been more favorable to the alien, or less prejudicial to her than that made by an examining inspector who had had the prior connections with the case, so complained of in this instance. The very impossibility of determining what the mental attitude of an examining inspector who had no previous connection with the case, would have been on one hand, and to what extent the conclusions, recommendations and conduct of the examining inspector in this case was influenced by his prior action with the case, on the other hand, is the condition which forces us to the conclusion that all such immigration hearings should be before an inspector who is known to be unbiased, or at least one who has not had previous connections with the case of such a character as would cause him to register his opinions, conclusions and belief against the alien prior to according the alien a hearing, and thus placing upon the alien the burden of overcoming the prejudice and registered opinions of the examining inspector, which she would not have to so overcome if her hearing were had before an immigration inspector who had had no previous connection with the case. A case which illustrates the point desired to be made in this connection is

that of U. S. v. Redfern, 180 Fed. 500, in which it is held (501-502):

> "It is urged by the respondent that there are but three immigrant inspectors at this port, and therefore it is necessary that they all serve upon every board of special inquiry, and, there being not less than three, no other United States officer can be designated to serve on such board. I do not agree with this contention. The law should be construed to mean that, in all cases where there are not three immigration officers eligible to serve, then other United States officers may be designated.
>
> "It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal, and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe the law contemplates that the inspector who makes the preliminary examination shall serve on the board of special inquiry, and I must hold in this case that the board which denied to petitioner the right to land was illegal and without power."

There are a large number of reported cases in which warrants of deportation issued as a result of hearings conducted prejudicial to the alien have been cancelled, and set aside, and quite generally in these cases it appears that the inspector conducting the hearing had previously been the arresting officer, inquisitor and the one who applied for, and caused the warrant of arrest to be applied for. Among these cases is that of U. S. v. Williams, supra, in which it was held:

> "Who had any interest in dissuading them except Tedesco and Nicolay? Nicolay had originally made the charge, and Tedesco had

> preferred it. They both had the ordinary detective's belief in guilt and zeal for conviction. Tedesco appears at every turn in the transaction resisting all attempts of any counsel to see the aliens."

Another case illustrative of the examining inspector acting as prosecutor and judge is that of Hanges v. Whitfield, 209 Fed. 675 (681):

> "The conclusion is unavoidable, under the testimony in this case, that the hearing before the inspector (who acted as prosecutor and judge upon such hearing) has not the semblance of a fair hearing."

Another case of an immigration inspector acting in such capacities as herein complained of is that of Ex Parte Lam Fuk Tak, 217 Fed. 468.

A further case illustrative of the conditions with respect to the immigration inspector conducting a hearing which is complained of in this regard, is that of Ex Parte Lam Pui, 217 Fed. 456. The opinion is quite lengthy, and illustrates many points and cites a great many cases, and the portion of the decision to which the attention of the Court is specifically directed is more of a resume or a conclusion from the different instances cited:

> "Long, and frequently sad, experience teaches that when officers intrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved. If necessity, or the public safety,

> demands that swift, unusual, and summary methods of procedure be permitted, the power should be conferred by the people's representatives in Congress in clear and unmistakable terms, and not by rules of departments conferring such power upon inspectors."

Another case upon the point of prejudice of the examining inspector is pointed out in U. S. v. Sprung, 178 Fed. 903. In the dissenting opinion of Circuit Judge Pritchard he discusses the views of the majority of the Court, in which he states as follows (908):

> "It is insisted by a majority of the Court that there are only two instances where the Court below would have jurisdiction to grant a writ of habeas corpus: First, where the pleadings raise a question of law; second, where it is alleged that the petitioner cannot obtain a fair and impartial trial before the inspector."

In the case at bar, the final report or finding of the examining inspector, was an inpenetrable vehicle, within which could be cloaked his private opinions and conclusions. What they were, to what extent they submitted matters of evidence, or otherwise prejudiced the rights of appellant may never be known. This communication is a sealed book to the alien. To grant this opportunity to an immigration inspector who has acted as arresting officer, inquisitor and judge, it is felt hardly comports with our ideas of American justice.

Upon the point of the failure to afford an opportunity to answer the affidavits of Layne and

Bohle, an inspector, not prejudiced by his former connection with the case, and his affirmative finding and recommendation that the petitioner was an objectionable alien, would scarcely have withheld the affidavits from counsel until the final hearing, and then prevented their being answered by stating, "I do not feel justified in holding it open any more and will send the record as it appears to Washington with the protest made by you being part of it". The final protest of counsel was:

> "Attorney McGowan. We desire to protest at this limitation upon the right of counsel and this abridgment on the ability of the defendant to properly present a full and adequate defense."

The limitation upon the right of counsel and the abridgment on the ability of the defendant to properly present a full and adequate defense had reference to the immediate closing of case after the filing of the affidavits in question, and the giving of no chance to answer them. The obligation of affording an opportunity to answer newly presented evidence rests upon the inspector, Rule 22, Subdivision 4:

> "If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the government."

The affidavits in question were matters of evidence "thereafter presented" and the examining

inspector himself disposed of an application for a continuance by forestalling it and stated: "I do not feel justified in holding it open any more, and will send the record as it appears to Washington, etc." The final protest of counsel was after the inspector had so closed the case to send it to Washington, and his protest against "the abridgment on the ability of the defendant to properly present a full and adequate defense" had reference to this exact condition.

With these observations this petition for a rehearing is most respectfully submitted to this Honorable Court.

Dated, San Francisco,
June 8, 1915.

GEO. A. MCGOWAN,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing is in judgment of counsel well founded, and it is not interposed for delay.

GEO. A. MCGOWAN,
Attorney for Appellant and Petitioner.